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GUERRE; AND MIKE SMITH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JAMES ALAN BUSH,
Plaintiff,

v.

CLOUDMARK, KIM MOSS, TOM DOE
1, MIKE SMITH, JAMIE DE GUERRE,
AND DOES 2 TO 5, INCLUSIVE,
Defendants.

Case No. C08 01272 PVT

**AMENDED [PROPOSED] ORDER IN
SUPPORT OF MOTION TO DISMISS, OR
IN THE ALTERNATIVE, FOR SUMMARY
JUDGMENT**

On September 22, 2008, in Courtroom 8 of the above-entitled Court, the motion of Defendants Cloudmark, Inc., Kim Moss, Jamie De Guerre, and Mike Smith ("Defendants") to dismiss Plaintiff's action with prejudice under Federal Rules of Procedure, Rules 12(b)(1) and 12(b)(6), or in the alternative, for summary judgment pursuant to Rules 12(d) and 56, came on regularly for hearing in the above-captioned matter. Defendants appeared through counsel Dennis M. Brown and Maryam S. Karson. Plaintiff appeared in pro per.

The Court, having considered the points and authorities in support of and in opposition to the motion, and having considered all of the evidence and contentions in the Court's files and records in this matter and the oral argument of counsel and Plaintiff, finds that Plaintiff's Complaint fails to state any claim upon which relief may be granted, or alternatively, finds that there is no genuine issue as to the following material facts and Defendants are entitled to judgment as a

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1 matter of law, based on the following findings:

2 1. On March 15, 2005, Plaintiff signed a valid Severance Agreement and
3 Release of All Claims. The claims pleaded in the Complaint are within the scope of the release
4 signed by Plaintiff. As such, Plaintiff is permanently barred from litigating his claims against
5 Defendants.

6 2. Plaintiff's claims based on the California Fair Employment and Housing Act
7 and the Americans with Disabilities Act are time-barred. This is so, because Defendants' allegedly
8 unlawful conduct took place almost three years prior to the filing of Plaintiff's Complaint and the
9 applicable statute of limitations with respect to Plaintiff's claims expired prior to the filing of his
10 Complaint. Additionally, Plaintiff did not exhaust his administrative remedies prior to filing suit and
11 is now time-barred from doing so.

12 3. Plaintiff's Complaint fails to state a claim upon which relief may be granted,
13 because viewed in the light most favorable to Plaintiff, Plaintiff has failed to plead the essential
14 elements of his FEHA and ADA-based claims. Additionally, Plaintiff's claims based on the Civil
15 Rights Act solely rely upon his status as a clinically depressed homosexual contracted with the
16 Acquired Immune Deficiency Syndrome. In light of the facts that Plaintiff is a Caucasian male and
17 42 U.S.C. sections 1981, 1983 and 1985 only protect individuals who allege racial discrimination,
18 Plaintiff's claims are subject to dismissal with prejudice.

19 4. Defendant Cloudmark, Inc. is a private corporation and is not affiliated with
20 any federal, state, or local governmental agency.

21 5. This Court does not have subject-matter jurisdiction to entertain Plaintiff's
22 ADA-based claims.

23 **IT IS HEREBY ORDERED** that Plaintiff's entire action be dismissed with
24 prejudice as to each and every Defendant in this action. Alternatively, it is ordered that summary
25 judgment be granted in favor of each and every Defendant in this action.

26 **SO ORDERED.**

27 Date: _____

28 DISTRICT COURT JUDGE JAMES WARE

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2.

[PROPOSED] ORDER